STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(before Owens, P.J., Schuette, J.J., and Borello, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and
LAURA BAIRD,

Plaintiffs/Appellees,

-v-

THE STATE OF MICHIGAN,

Defendant/Appellant,

and

GAMING ENTERTAINMENT (Michigan), LLC,
LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS,

Intervening Defendants/Appellees.

Supreme Court No. 129816

Court of Appeals No. 225017

Ingham County Circuit Court
No. 99-90195-CZ

BRIEF ON APPEAL – *AMICI CURIAE* LITTLE RIVER BAND OF OTTAWA INDIANS, NOTTAWASEPPI HURON BAND OF POTAWATOMI, AND, POKAGON BAND OF POTAWATOMI INDIANS

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INTERESTS OF THE *AMICI* TRIBES

The *Amici* – the Little River Band of Ottawa Indians (the "Little River Band"), the Pokagon Band of Potawatomi Indians (the "Pokagon Band"), and the Nottawaseppi Huron Band of Potawatomi (the "Huron Band") (hereinafter collectively referred to as the "*Amici* Tribes" or "*Amici*") – have witnessed seven years of litigation in which the Plaintiff, an organization calling itself Taxpayers of Michigan Against Casinos ("TOMAC"), has engaged in "scorched earth" efforts to stop Indian tribes in Michigan from realizing Congress's goals under the Indian Gaming Regulatory Act, 25 USC §§ 2701-2721 ("IGRA"), "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *See* 25 USC § 2702(1).[1]

Relieved of TOMAC's challenges to the validity of their Compacts by virtue of this Court's decision of July 30, 2004, the *Amici* Tribes breathed a sigh of relief, and continued to embark upon efforts to realize their economic development goals through gaming by entering into significant financial and other commitments described below. Beset now with a brand new claim by TOMAC to again challenge the validity of their Compacts – a claim not even hinted at in its 1999 Complaint and raised only for the first time on remand to the Court of Appeals in late 2004 – the *Amici* Tribes have a substantial interest in addressing this Court.

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[1] In addition to this case, TOMAC engaged in protracted litigation in the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit for five years, seeking to prevent the Pokagon Band from restoring its reservation lands. *See TOMAC v Norton*, 193 F Supp 2d 182 (D DC 2002); *TOMAC v Norton*, 2005 US Dist. LEXIS 4633 (D DC 2005); *TOMAC v Norton*, 369 US App DC 85, 433 F3d 852 (2006). In an opinion finally ending the case this year, the D.C. Circuit variously described TOMAC's claims as having "no merit" and as "specious." *Id.*, 433 F3d at 855, 866.

The *Amici* Tribes initially describe TOMAC's attempt to insert its new claim in the face of their reliance upon the finality of any further challenge to their Compacts in this case. They then describe their interests in light of the substantial benefits at stake for them through gaming under IGRA.

The Apparent Finality of TOMAC's Challenge to the Compacts and its New Claim

On July 30, 2004, this Court rejected TOMAC's claims, based on a Complaint filed in the Ingham County Circuit Court over five years earlier, that the virtually identical Compacts of the *Amici* Tribes and the Little Traverse Bay Bands of Odawa Indians (the "Little Traverse Band"), approved by the Legislature by resolution in 1998, constituted "legislation," requiring enactment by bill. *See Taxpayers of Michigan Against Casinos v Michigan*, 471 Mich 306; 685 NW2d 221 (2004), *cert den*, 543 US 1146 (2005) ("*TOMAC I*"). TOMAC, asserting the finality of the case, sought review in the Supreme Court of the United Sates by writ of *certiorari*, and the Supreme Court denied review by order entered February 22, 2005. *See Taxpayers of Michigan Against Casinos v Michigan*, 543 US 1146 (2005).

In its July 30, 2004, decision, this Court identified the sole remaining Count III of the Plaintiffs' Complaint – whether a provision in the Compacts, allowing the Governor and a Tribe to enter into an amendment without returning to the Legislature for approval, violated the separation of powers clause of the Michigan Constitution – as having become ripe for consideration in light of amendments to the Little Traverse Band's Compact, which had been consummated during the pendency of the appeal. *See TOMAC*

I, 471 Mich at 333.[2] Although the Court of Appeals had found jurisdiction wanting with respect to Count III due to lack of ripeness, *see Taxpayers of Michigan Against Casinos v People*, 254 Mich App 23, 48; 657 NW2d 503, 517 (2002), this Court directed remand to the Court of Appeals for narrow consideration of whether, in light of the amendments to the Little Traverse Band's Compact, "the provision in the Compacts purporting to empower the Governor to amend the Compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2." *TOMAC I*, 471 Mich at 333.

In her separate concurrence, Justice Kelly suggested that the only claim pleaded by (and therefore available to) TOMAC under Count III was a facial challenge to the Compacts. *See TOMAC I*, 471 Mich at 348-49 (Kelly, M., concurring). She concluded

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[2] In Count III of its Complaint, TOMAC asserted, *inter alia*, as follows:

64. Article III, Section 2 of the Michigan's Constitution provides that:

> The Powers of government are divided into three branches; [sic] legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution. . . .

67. According to their terms, the Gambling Compacts may be amended by the Governor without approval of the Legislature. Gambling Compacts § 16. Therefore, the Governor can rewrite the Gambling Compacts and effectively enact new legislation without the involvement of the Legislature, and even if the Legislature disapproves. . . .

69. Thus, the State has improperly delegated legislative power to the executive in violation of the separation of powers doctrine set forth in Article III, Section 2, of Michigan's Constitution.

WHEREFORE, the Plaintiffs respectfully ask the court for a declaration that the State has violated Article III, Section 2, of Michigan's Constitution and that the Gambling Compacts are consequently null and void as currently written.

Complaint at 21-22. A full copy of the Complaint is set forth as Attachment A hereto.

that such a challenge must fail as a matter of law, *id.* at 349, and further suggested that any other claim might well be subject to dismissal, as the Court of Appeals had concluded, for lack of ripeness as of the time of TOMAC's 1999 Complaint. *Id.* at 349 (citing 15 MOORE'S FEDERAL PRACTICE § 101.05, § 101.74).

In any event, since this Court disposed of all of TOMAC's claims other than its separation of powers claim under Count III of its Complaint, no challenge remained to the legal validity of the Compacts as a whole. Indeed, given this Court's narrow remand order, the sole claim left for adjudication could *only* be the propriety, under the separation of powers clause, of amendments to the Little Traverse Band's Compact. And that claim could not, in any way, affect the legal validity of the Compacts because even if TOMAC were successful in challenging the amendment provision of the Compacts, the remainder of the Compacts' provisions, under their plain terms, would stand.[3]

TOMAC now wants to change this posture of the case and to bring a new claim, which the Court of Appeals refused to entertain, one that is completely unrelated to Count III and this Court's remand order in *TOMAC I.* Having never before asserted such

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[3] Section 12(E), an identical provision in each of the four Compacts at issue, provides:

> In the event that any section or provision of this Compact is disapproved by the Secretary of the Interior of the United States or is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect. This severability provision does not apply to Sections 17 and 18 of this Compact.

See Compacts § 12(E). The amendment process is set forth in Section 16 of the Compacts. Clearly, therefore, by the plain terms of the Compacts, any invalidity of that section could not affect the remaining provisions of the Compacts. A copy of the Pokagon Band's Compact (which is, in all pertinent parts, identical to those of the Little River Band, the Huron Band, and the unamended version of the Compact of the Little Traverse Band) is set forth as Attachment B.

a claim, TOMAC now asks this Court to declare that the Compacts of all four Tribes are "invalid" because (1) "without a legislative appropriation, the Compacts' payment provisions are unenforceable" and (2) "the Compacts' payment provision [section 17] is non-severable, and so the Compacts are invalid in their entirety." *Brief of Plaintiffs/Appellees/Cross-Appellants* ("TOMAC's Brief") at 9-12. For the reasons set forth in the *Amici*'s arguments below, TOMAC is barred from bringing such a claim.

The *Amici* Tribes' Reliance upon the Finality of any Challenge to their Compacts

Clear of the legal challenges to their Compacts, the *Amici* Tribes (and the Little Traverse Band) have undertaken substantial steps, including financial commitments and investment of resources, to realize Congress's goals of tribal self-sufficiency and economic development under IGRA.

For example, after this Court's July 30, 2004 decision in *TOMAC I* and the Supreme Court's denial of review, the Pokagon Band proceeded to secure financing to develop its gaming resort complex in New Buffalo, Michigan. Additional funds were borrowed and spent for architectural, engineering and related third party work. These plans reached finality after the Secretary of the Interior defeated TOMAC's companion litigation in the federal courts (*see supra* note 1) and land for the facility was taken into trust by the federal government in March 2006. Indeed, the Pokagon Band issued $305 million of senior notes for the project and committed to $75 million in equipment financing in addition to $46 million in loans for the project from the Band's gaming management company. The Huron Band similarly continues to pursue its efforts to

restore its land base and to realize the promise of IGRA in reliance upon the validity of its Compact.

The Little River Band and the Little Traverse Band have also committed substantial resources to improve their gaming facilities to support their tribal governments. Following this Court's decision in *TOMAC I* and relying upon the validity of the Compacts established by that decision, the Little Traverse Band secured $120 million in financing for a new expanded facility to replace the temporary location of its gaming operations in a converted bowling alley. Its plans for this wholly modern gaming resort, including restaurants and an entertainment venue, are now well underway, with a foundation dug, concrete poured, and steel girders in place. The Little River Band similarly invested substantial resources to realize economic development through gaming following *TOMAC I*, embarking upon a substantial gaming expansion project, on the basis of a $45 million loan, to triple the number of hotel rooms and build a related entertainment center.

Given this substantial reliance upon the finality of this Court's decision upholding the legal validity of their Compacts in July 2004, the *Amici* Tribes have significant interests in addressing TOMAC's new attempt to challenge that validity. This is especially true in light of the substantial benefits they stand to gain for their tribal governments and their members by achieving the gaming opportunities presented by their Compacts and in accordance with Congress's goals under IGRA.

The *Amici* Tribes' Interest In Realizing the Benefits of their Compacts and IGRA

In presenting their *Amicus* brief to this Court the last time this case was before it, the *Amici* Tribes described the substantial importance of gaming to their goals of building strong tribal governments and economic development. Those considerations bear repeating, in large part, here.

Experience in Michigan has proven that gaming can indeed operate, as Congress in 1988 hoped it would, to foster tribal economic and political development. At the time that the Michigan tribes commenced gaming, they had endured a century and a half of economic and cultural deprivation. Living conditions for tribal members residing on reservations were very poor, and the tribes lacked many elements of a proper governmental infrastructure. *See, e.g, Grand Traverse Band of Ottawa & Chippewa Indians v United States Attorney*, 198 F Supp 2d 920, 926 (WD Mich 2002), *aff'd* 369 F3d 960 (CA 6, 2004) (as of 1993, the Grand Traverse Band had "significant unmet economic and noneconomic needs"). In 1989, for example, the unemployment rate among Michigan Indians living on and adjacent to Reservations averaged 37.4 percent, or more than four times the statewide rate.[4] The per capita income among Michigan's Indian population in 1989 was $6,807, compared with a per capita income statewide of $14,154.[5]

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[4] US Department of the Interior, Bureau of Indian Affairs, *Indian Service Population and Labor Force Estimates*, Table 3 (Dec. 1991).

[5] US Department of Commerce, Bureau of the Census, *Income and Poverty Status in 1989*, 1990 Summary Tape File 3 (DP-4) (Michigan); US Department of Commerce, Bureau of the Census, *Per Capita Income in 1989 by Race*, 1990 Summary Tape File 3, P115A (Michigan).

This disparity in economic conditions mirrored a disparity in health and educational circumstances. Indians in the region faced diabetes and alcoholism mortality rates five times the national average,[6] and a tuberculosis mortality rate thirteen times the national rate.[7] Only 4.5 percent of reservation Indians had a college degree or higher, while in Michigan overall, the figure was 17.4 percent.[8]

Gaming has led to dramatic improvements in these conditions. It has served as an engine of economic development and employment for tribes. The gaming casino operated by *Amicus* Little River Band, for instance, employs over 900 full-time individuals, of whom close to 100 are tribal members. The Tribe's gaming revenues also provide significant support for its governmental services, including over $10 million this fiscal year for improved housing, health care, elder, and other social services; nearly $1.5 million for public safety and the tribal judiciary; and nearly $1 million for education. *See* Attachment C. These governmental operations, in turn, provide over 100 additional jobs for tribal members (and nearly 200 for others). The Little Traverse Band has likewise thrived from its gaming operations. Its casino employs over 500 people, of whom over 100 are tribal members. The casino provides over $3 million for that Tribe's housing, health, and human services; over $700,000 for its law enforcement and judiciary; and

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[6] US Department of Health and Human Services, Indian Health Service, *Regional Differences in Indian Health* (1990), Table 4.18. This analysis includes the Tribes in Michigan, together with those in Wisconsin and Minnesota.

[7] *Id.* at Table 4.21.

[8] *Id.* at Tables 4.16, 4.17; 1990 Census, American Indian at Table 7; 1990 Census, Social Characteristics, Summary Tape File 3, DP-2 (Michigan).

over $700,000 for education services. *See* Attachment D. As in the case of the Little River Band, these governmental services, in turn, provide jobs for 100 tribal members. *See also Grand Traverse Band*, 198 F Supp 2d at 926 ("The [Grand Traverse Band] casino now employs approximately 500 persons, approximately half of whom are tribal members . . . [It] provides some of the best employment opportunities in the region.").[9]

The great strides in tribal self-governance facilitated by gaming have also led to a degree of cooperation between tribal, state, and local governments that was largely unheard of when the tribes lacked the governmental resources to devote to such efforts. Cooperation between the state and tribal courts, for instance, has led to the adoption of companion rules for observing the full faith and credit of each other's "judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts." *See* MCR 2.615; Little River Band Reg 1.100-1.103; Little Traverse Bay Bands CR 4.000-4.400; Grand Traverse Band CR 10.001-10.107; Bay Mills Indian Community CR 1.101-1.301; Hannahville Indian Community, CR 1.000-1.300). *See generally* Cavanagh, *Michigan's Story: State and Tribal Courts Try to Do the Right Thing*, 76 U Det Mercy L Rev 709 (1999).

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[9] As the figures in the text indicate, Indian gaming provides significant benefits not only to tribal members but also to many non-Indians who work at, or do business with, tribal gaming establishments. In May of this year, for instance, the *Amici* Tribes, the Little Traverse Band, and other Michigan tribes executed the *Intergovernmental Accord between the Tribal Leaders of the Federally Recognized Indian Tribes in Michigan and the Governor of the State of Michigan to Expand Joint Economic Development Activities* (Attachment E). This Accord establishes the Tribal-State Economic Forum with a variety of tasks to accomplish cooperative economic development ventures between the Tribes and the State, including a target of creating 1,000 new jobs through joint efforts. *See* Attachment E. In 2003, the Little Traverse Band received a Legislative Tribute (Attachment F) and the *Mission Award* (Attachment G) from the Petoskey Regional Chamber of Commerce as "an integral economic force in the region."

Michigan's gaming tribes have also entered into cooperative law enforcement agreements with local officials that have strengthened the ability of the respective jurisdictions to combat crime. The *Interlocal Agreement for Deputization and Mutual Law Enforcement Assistance Between the Little Traverse Bay Bands of Odawa Indians and the County of Emmet* (Attachment H) is one example. That agreement allows state or county officers to execute search warrants within the Band's reservation by first converting the warrant into a tribal court warrant and then executing it with tribal police, non-tribal police officers, or a combination of both. *See id.* at 3-5. A similar agreement exists between the Grand Traverse Band of Ottawa and Chippewa Indians and Leelanau County. *See Deputization Agreement Between the Grand Traverse Band of Ottawa and Chippewa Indians and the Sheriff of Leelanau County* (Attachment I) at 4 ("County law enforcement officers shall present search warrants authorizing the search for evidence located on the Tribe's reservation and Indian country . . . to Tribal law enforcement authorities for execution."). Such vitality in the relations between tribal and state governments was largely non-existent prior to the onset of IGRA gaming, given the Tribes' meager resources.

In sum, Michigan tribal members have experienced a significant improvement in their economic, health, educational and social conditions as the result of Indian gaming. Michigan tribal governments have also experienced a renaissance due to the critical funding that gaming provides for their operations. But much more remains to be done. The Little River Band has only had a few short years to begin to remedy the socio-economic problems that have plagued its people for many decades and to restore its tribal

government to a full measure of dignity. The Pokagon Band and the Huron Band, have not yet had any opportunity to even begin to make such progress.[10] In this respect, the *Amici* Tribes' interest in this case is thus both obvious and critical. They seek to ensure that the promise of IGRA and the Compacts – the promise of an opportunity for a brighter economic future and stronger tribal governments – does not go unrealized.

[10] The profound impact of gaming on the economic circumstances of tribal members is well illustrated by the differences between the Pokagon Band and the Huron Band, on the one hand, and the Little River Band and the Little Traverse Band, on the other. In 1999, the median household income for the former two tribes, which have not yet undertaken gaming was $14,375 and $29,750, respectively. For the same year, the median household income of the Little River Band and Little Traverse Bay Bands, each of which had commenced IGRA gaming, was $40,156 and $40,385, respectively. US Census Bureau, *Census 2000*, Profile of Selected Economic Circumstances, DP-3.

STATEMENT OF JURISDICTION

The *Amici* Tribes agree with Statement of Jurisdiction set forth in the *Brief on Appeal of Intervenors as Appellees*.

QUESTION PRESENTED

Did the Court of Appeals properly decline to entertain a new claim by TOMAC, asserted for the first time after this Court disposed of all but one Count of TOMAC's 1999 Complaint and remanded the case to the Court of Appeals for narrow consideration of the sole remaining Count?

The Court of Appeals entered an order striking TOMAC's belated claim.

TOMAC answers: No.

The State and Intervenors answer: Yes.

The *Amici* Tribes answer: Yes.

COUNTER-STATEMENT OF FACTS

The *Amici* tribes initially set forth the procedural history of the case, which TOMAC neglected to do in its brief. This history provides the context within which TOMAC now seeks, for the first time in a second appeal to this Court, to insert a brand new claim into the case, over six years after it first filed its Complaint.

The Compacts and TOMAC's Complaint Challenging Them

The Compacts at issue were signed by Governor Engler and the *Amici* Tribes and the Little Traverse Band in 1998. Each provided that it would take effect after "endorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature." *See* Compacts (Attachment B). The Legislature approved the Compacts by resolution on December 10, 1998. The Secretary of the Interior subsequently allowed the Compacts to take effect as a matter of law pursuant to 25 USC § 2710(d)(8)(B), and they were published in the Federal Register on February 18, 1999, pursuant to 25 USC § 2710(d)(8)(C).[11] 64 Fed Reg 8111 (1999). On June 30, 1999, TOMAC and State Representative Laura Baird, who voted against the resolution approving the Compacts (collectively "Plaintiffs" or "TOMAC), filed a three-Count complaint for declaratory

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[11] 25 USC § 2710(d)(8) provides in pertinent part:

> The Secretary is authorized to approve any Tribal-State Compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe . . . If the Secretary does not approve or disapprove a Compact . . . before the date that is 45 days after the date on which the Compact is submitted to the Secretary for approval, the Compact shall be considered to have been approved by the Secretary, but only to the extent the Compact is consistent with the provisions of this Act. . . . The Secretary shall publish in the Federal Register notice of any Tribal-State Compact that is approved, or considered to have been approved, under this paragraph.

judgment against the State of Michigan in the Circuit Court for Ingram County. *See* Complaint (Attachment A).[12]

In Count I, the Plaintiffs claimed that the Compacts "are legislation" because they "legalize gambling activities that otherwise violate Michigan law." Complaint at 17. They sought a declaratory judgment that, as legislation, the Compacts must be "enacted by bill," under Article IV, Section 22 of the Michigan Constitution, requiring approval by a majority of the elected members of both houses of the Michigan Legislature, rather than by legislative resolution, which requires approval by majority of the members present and voting. *See* Complaint at 17-18.

In Count II, the Plaintiffs claimed that the Compacts, by limiting the Tribes' gaming to Indian lands within certain geographic areas, must be deemed legislative enactments that constitute "local acts." They thereby sought a declaratory judgment that, as "local acts," the Compacts were required by Article IV, Section 9 of the Michigan Constitution to be enacted by a two-thirds majority of the legislators in each house and by a majority of the electors "in the district affected." *See* Complaint at 18-19.

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[12] TOMAC's tenacious litigation efforts in the state and federal courts coincided with an effort by Boyd Gaming, which operates a "river boat" casino in the same market as the Pokagon Band's planned gaming, to obstruct that Tribe's gaming efforts. In 1999, Boyd contracted to pay Michigan casino magnate, Kevin Flynn, $5 million to delay the Pokagon Band's gaming operations for five years and was later fined $1 million by the Indiana Gaming Commission for failing to disclose this "Consulting Contract." *Amicus* the Pokagon Band is of the view, supported by suggestions in the media, that TOMAC's, Boyd's, and Flynn's use of the same law firm and consulting firms is not coincidental. *See generally* K. Buchthal, "Kevin Flynn draws Michigan aces: Ex-casino owner eyes $5-mil prize," CRAIN'S CHICAGO BUSINESS (May 10, 2004), *available at* http://chicagobusiness.com/cgi-bin/mag/article.pl (under search for Kevin Flynn); G. Wells, "High rollers join West Michigan casino fight," THE GRAND RAPIDS PRESS (July 8, 2001), *available at* http://www.gamblingmagazine.com/articles/14/14-1528.htm.

Finally, in Count III, quoted *supra* note 2, the Plaintiffs claimed that, as legislation, the Compacts could not be amended by agreement between a given Tribe and the Governor without approval by the Legislature. Thus, Plaintiffs sought a declaratory judgment that the provision in the Compacts allowing amendment by the Governor violated the separation of powers provision in Article III, Section 2 of the Michigan Constitution. *See* Complaint at 21.

Notably, nowhere in the Complaint did TOMAC assert that the Compacts violated the appropriations clause, Article IX, Section 17 of the Michigan Constitution, which provides "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." Nor did the Plaintiffs ask for relief that would include a declaration that the Compacts are "void." *See* Complaint (Attachment A).

Judgments Entered in the Circuit Court, the Court of Appeals, and in this Court

On cross-motions for summary judgment, the Ingham County Circuit Court held, by order dated January 18, 2000, that the Compacts had the character of "legislation," that they should have therefore been approved by bill, and that the amendment provision violated the separation of powers clause. It rejected the Plaintiffs' second Count and held that the Compacts were not "local acts." On appeal, the Court of Appeals reversed with respect to Counts I and III, and affirmed with respect to Count II. *See Taxpayers of Michigan Against Casinos v People*, 254 Mich App 23 (2002), *aff'd*, 471 Mich 306 (2004), *cert den*, 543 US 1146 (2005). In its opinion, issued in November 2002, the Court of Appeals held that the Compacts were in the nature of contracts, not legislation, and, therefore, need not be enacted by bill. *See id.* at 36-43. With respect to Count II, the Court of Appeals agreed with the Circuit Court that the Compacts did not run afoul of the Local Acts provision of the

Constitution. *Id.* at 48. Finally, on Count III, TOMAC's request for a declaratory judgment that the Compacts' amendment provision violated the separation of powers clause, the Court of Appeals reversed the Circuit Court. *See id.* at 48-49. Since no attempt had been made to amend the Compacts, the Court held that it lacked jurisdiction to address that claim for lack of ripeness. *Id.* at 48

This Court granted TOMAC's petition for review and issued its decision on July 30, 2004. The Court affirmed the judgment of Court of Appeals. *TOMAC I*, 471 Mich at 335-36. It rejected TOMAC's request for a declaratory judgment under Count I. *See id.* It held that the Compacts were not "legislation," requiring enactment by bill under Const 1963 art IV, § 22 because they do not involve the unilateral imposition of authority by the State, a fundamental hallmark of legislation. *Id.* at 317-327. Instead, the Court said that the Compacts were in the nature of contracts between two sovereigns and, therefore, did not need to be enacted by bill. *Id.* at 321-327. With respect to Count II, the Court likewise affirmed the judgment of the Court of Appeals and held that the Compacts did not constitute local acts under Article IV, Section 29, requiring approval by a special majority vote of the Legislature. *Id.* at 334-35.

Finally, as described above, the Court said that TOMAC's separation of powers claim, Count III, had become justiciable during the pendency of the appeal in light of the amendments to the Little Traverse Band's Compact entered into by that Tribe and Governor Granholm. *Id.* at 333. Recognizing the impropriety of addressing such a claim for the first time on appeal, however, the Court ordered this claim remanded to the Court of Appeals. Since "the lower courts have not yet been able to assess this issue," the Court said, "it is not

proper for us to do so now." *Id.* *Accord id.* at 350 (Kelly, J., concurring) ("This Court has consistently declined to entertain constitutional questions where it lacks the benefit of a fully developed lower court record. *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003); *Jenkins v Patel*, 471 Mich 158; 684 NW2d 346 (2004)."). In the instant appeal, as discussed in the Argument below, TOMAC seeks to thwart this clear and well-established admonition.

This Court ordered a narrow remand to the Court of Appeals "to consider whether the provision in the Compacts purporting to empower the Governor to amend the Compacts without legislative approval violates the separation of powers doctrine found in Const 1963, art 3, § 2," and directed that "[t]he Court of Appeals should remand to the trial court if it determines that further fact-finding is necessary to resolve the issue." *TOMAC*, 471 Mich at 333. "In all other respects," the judgment of the Court of Appeals was affirmed by this Court. *Id.* at 336.

Remand Proceedings in the Court of Appeals, Its Decision On Count III, and Further Petitions to this Court

After remand to the Court of Appeals, the Little Traverse Band intervened to address the sole issue presented by the Court's remand order. In November 2004, the Court of Appeals issued an order on three narrow subjects of briefing:

> (1) whether the provision in the tribal-state gaming Compact of the Little Traverse Bay Band of Odawa Indians, purporting to allow the governor to amend the Compact without legislative approval, violates the separation of powers clause, Const 1963, art 3, § 2, (2) assuming that the amendment provision in the Compact is constitutional, whether any aspect of the exercise of the power to amend violated the separation of powers clause, Const 1963, art 3, § 2, and (3) what effect will there be on the amendment as a whole if an aspect of the amendment violates the separation of powers clause.

Taxpayers of Michigan against Casinos v Michigan, 268 Mich App 226, 233; 708 NW2d 115, 119 (2005).

In its brief to the Court of Appeals, however, TOMAC, for the first time, sought to raise its new claim: that, in light of the Michigan Supreme Court's decision, the Compacts' revenue sharing provision (section 17 in each Compact), under which the Tribes agreed to pay the State 8% of their net win on a semi-annual basis for limited rights of exclusivity, had to be considered a contractual obligation and, as such, constituted an "appropriation" of funds for the State, which could only be valid if enacted as a law under the appropriations clause. *See Plaintiff's Supplemental Brief Addressing Compact Amendment*, dated Nov. 5, 2004 (Mich Ct App No. 225017) at 14-16. TOMAC further attempted to claim that if that provision were held invalid under the appropriations clause, the entire Compact of each Tribe would have to be held void because, TOMAC alleged, under the terms of the Compacts, section 17 is not severable. *See id.* at 16.

Intervenor Gaming Entertainment LLC ("GE") filed a motion to strike TOMAC's new appropriations clause claim on the grounds that it was beyond this Court's remand order and barred by established principles of repose.[13] The Court of Appeals granted GE's motion to strike, without comment, by order dated December 9, 2004. *See* Order, Dec. 9, 2004 (Mich Ct App No 225017).

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[13] *See Intervening Defendant/Appellant/Cross-Appellee Gaming Entertainment, LLC's Motion to Strike Arguments Advanced in Sections II.B and III of Plaintiff/Appellee/Cross-Appellant Taxpayers of Michigan Against Casinos' Supplemental Brief Addressing* Compact *Amendment*, filed in the Court of Appeals on Nov. 12, 2004.

In its opinion issued on September 22, 2005, the Court of Appeals decided the separation of powers question remaining in Count III in reference to the amendments to the Little Traverse Band's Compact. The Court (over one dissent) held that the State's contracting power was held by the Legislature and that the Governor could not exercise that authority without an express delegation by the Constitution or by statute. *Taxpayers of Michigan against Casinos v Michigan*, 268 Mich App at 243. The State of Michigan and the Little Traverse Band petitioned for review to this Court. TOMAC filed a petition seeking review of the Court of Appeals' failure to address its new appropriations clause claim. This Court granted the petitions of all parties, without comment, by orders dated March 29, 2006.

SUMMARY OF ARGUMENT

The rule that new claims may not be raised for the first time on appeal and principles of *res judicata* bar TOMAC from attaining adjudication of its new appropriations clause claim seven years after it first filed its complaint and two years after this Court decided *TOMAC I*. With the limited exception of its narrow remand of Count III to the Court of Appeals, this Court reached final disposition of all of TOMAC's claims, and the parties affected (including the non-joined Tribes whose Compacts were in question) were entitled to view that disposition as final. The Court of Appeals' refusal to entertain TOMAC's belated new claim must therefore be affirmed.

ARGUMENT

I. INTRODUCTION

In over six years of litigation, TOMAC failed to assert its appropriations clause claim, perhaps out of hesitancy to plead in the alternative because its theory of the case was (until this Court decided against that theory in *TOMAC I*) that the Compacts, by their nature, must be considered laws, not contracts. *See* Complaint (Attachment A). It is too late for TOMAC to now insert a brand new claim into this case to suit its convenience. Under the governing rules of this Court, claims must be properly set forth in a complaint, subjected to an answer and affirmative defenses, perhaps even counterclaims, and then examined against facts and dispositive motions. Prudential doctrines, grounded in repose and finality, ensure that these orderly procedures are followed, and prohibit TOMAC from now seeking to adjudicate a new claim, seven years after it filed its Complaint and for the first time on appeal.

II. THE NARROW ISSUE PRESENTED AND THE STANDARD OF REVIEW

The petitions of the State of Michigan and Little Traverse Band squarely present the only remaining claim that has not been disposed of in this litigation, TOMAC's separation of powers clause claim under Count III of its Complaint. Since that claim ripened during the pendency of the last appeal, it presents the issue of whether the Compact provision allowing the Governor to amend the Compacts, in light of Governor Granholm's exercise of that authority, violates the separation of powers clause of the Michigan Constitution. Beyond this, the only issue raised by TOMAC's petition is whether the Court of Appeals erred by granting GE's motion to strike its new

appropriations clause claim. There is no decision on the merits of that claim presented for review. Therefore, in light of this Court's prior opinion that it is "not proper" for a Court to address a claim that has not been first decided by the lower courts, *see TOMAC I*, 471 Mich at 333; *accord id.* at 348-49 (Kelly, J., concurring), the Court of Appeals clearly did not err, and that reason alone warrants affirmance.

Indeed, this Court should review the Court of Appeals' decision not to reach out and decide a brand new claim, never before raised in the case or set forth in a complaint, for abuse of discretion. *See Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (noting abuse of discretion standard); *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004) (denial of motion to amend complaint reviewed for abuse of discretion). TOMAC fails entirely to acknowledge this standard of review, hoping instead to present its new claim to this Court on the merits, bypassing the most fundamental rules of finality and repose. Under an abuse of discretion standard, the Court of Appeals clearly did not err in declining to allow TOMAC to bring a new claim for the first time in the context of the limited remand of the case on Count III of its Complaint. Rather, the Court of Appeals properly followed the clear admonition of this Court in *TOMAC I* that claims may not be addressed for the first time on appeal.[14]

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[14] It is further clear that the Court of Appeals did not abuse its discretion by declining to entertain TOMAC's new claim because its considerations on remand from this Court must be strictly confined to the terms of this Court's remand order. *See Rodriquez v General Motors Corp*, 204 Mich App 509, 514; 516 NW2d 105, 108 (1994) ("It is the duty of the lower court or tribunal, on remand, to comply strictly with the mandate of the appellate court."). The Court of Appeals had no authority to grant relief beyond the scope that order, which narrowly directed it to consider

III. TOMAC'S NEW CLAIM IS BARRED BY THE ESTABLISHED RULE THAT NEW CLAIMS MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL

A fundamental rule, closely related to this Court's admonition in *TOMAC I*, has been repeated by this Court on numerous occasions: new claims for relief (even claims grounded in the Constitution) may not be presented for the first time on appeal. *See, e.g., In re Forfeiture of Property*, 441 Mich 77; 490 NW2d 322 (1992); *Butcher v Dep't of Treasury*, 425 Mich 262; 389 NW 2d 412 (1986). And it is well-established, not only by this Court, but across the federal courts and other state courts, that only exceptional circumstances, for instance, to prevent a miscarriage of justice or to check the subject matter jurisdiction of the court, warrant a departure from this rule. *See, e.g., People v Snow*, 386 Mich 586; 194 NW2d 314 (1972) (issue addressed to prevent manifest miscarriage of justice); *Foster v Barilow*, 6 F3d 405, 409 (CA 6, 1993) (in absence of a showing of exceptional circumstance by party seeking to assert new claim for first time on appeal, court adheres to the policy that litigants and the courts are best served by having issue receive "full airing in the [trial] court"). *See also Hicks v Gates Rubber Co*, 928 F2d 966, 970-71 (CA 10, 1991) ("The need for finality in litigation and conservation of judicial resources counsels against exceptions."); *Westin Tucson Hotel Co v Arizona Dep't of Revenue*, 188 Ariz 360, 364 (Ariz App 1997) ("a claim raised for the first time in a reply is waived").

TOMAC's appropriations clause claim presents no such exceptional circumstance justifying a deviation from this rule of prudence, repose, and judicial economy.

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only Count III in light of the Little Traverse Bay Band's Compact amendments. *See Theisen v City of Dearborn*, 48 Mich App 571, 573; 210 NW2d 777, 778 (1973).

IV. THE COURT OF APPEALS COMMITTED NO ERROR OF LAW BECAUSE TOMAC IS BARRED BY THE DOCTRINE OF *RES JUDICATA* FROM RAISING ITS NEW APPROPRIATIONS CLAUSE CLAIM

Even more fundamentally, under Michigan law, the doctrine of *res judicata* applies not only to bar multiple actions between the same parties, but in the context of remand proceedings, *i.e.*, when issues were, or could have been raised, during a prior appeal. *See South Macomb Disposal Auth v American Ins Co*, 243 Mich App 647; 625 NW2d 40 (2000) (doctrine applied to remand proceedings); *Hadfield v. Oakland Co Drain Commiss'r*, 218 Mich App 351; 554 NW2d 43 (1996) (defendants failed to raise issue on original appeal and were thus precluded from raising issue on remand). As the Michigan Court of Appeals recently observed, "generally *res judicata* requires a party to bring in the initial appeal all issues that were then present and could have and should have been raised." *Neal v. Dep't of Corrections*, 2005 Mich App Lexis 342, * 12 (February 10, 2005). *See also VanderWall v Midkiff*, 186 Mich App 191, 201-202; 463 NW2d 219, 223-224 (1990) (failure to raise interest issue in initial appeal held to constitute waiver of argument on remand/second appeal under doctrine of *res judicata*).

The rationale for this application of the doctrine was first articulated by Michigan Court of Appeals Judge Gillis:

> If the Supreme Court had not remanded the case for further proceedings, it would seem that plaintiff would be forced to assert a claim against defendant-vendor in a new action. The original judgment would clearly bar his claim in a new action. The fortuity that the case was remanded for further proceedings on an issue other than defendant-vendor's liability for damages should not permit plaintiff to escape the bar of the original judgment.

VanderWall, 186 Mich App at 198; 463 NW2d at 223 (citing, with approval, *Meyering v Russell*, 85 Mich App 547; 272 NW2d 131 (1978) (Gillis, J., dissenting in part)).

Thus, the principles of *res judicata* preclude TOMAC from belatedly asserting its new appropriations clause claim. *See generally* Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2d, § 4434 (discussing application of preclusion doctrine in similar instances). Stating it another way, TOMAC waived any opportunity to properly bring its new claim into this litigation by means of amended complaint by not seeking to do so early on, and at least prior to the completion of its first appeal. *See also id.* § 1489 at 698 (amendments to original pleadings generally may not be made once the suit has reached the appellate level); § 1488 (canvassing precedent for the notion that long delay by the movant constitutes laches so that a refusal to permit an amendment is warranted).

In this case, TOMAC had every opportunity to properly raise the appropriations clause claim by seeking leave to amend its Complaint in the Circuit Court, or even in its first round of appeals. Having failed to do so, its claim must be deemed barred under the doctrine of *res judicata*. *See South Macomb Disposal*, 243 Mich App 647; *Hadfield*, 218 Mich App 351; *VanderWall*, 186 Mich App at 201-202. The Court of Appeals order striking TOMAC's new claim should therefore be affirmed on that basis as well.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth in this brief, as well as those set forth in the Brief of the State of Michigan as Appellee and the Brief of Intervenors as Appellees, this Court should affirm the Court of Appeals' decision, denying consideration of TOMAC's new appropriations clause claim.

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